IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CIVIL REVISION APPLICATION NO. 28 OF 2005

MITESH SHANKERLAL SHAH (HUF) & ANR... PETITIONERS

Vs.

DUSHYANT N. SHAH HUF .. RESPONDENTS

Mr. Jawahar J. Thakkar for petitioners

Mr. M. P. Rao for respondent

CORAM:-SMT. RANJANA DESAI, J.

DATED:-5/4/05

P.C.

The petitioners are original defendants in Summary Suit No. 2396 of 2001 pending in the City Civil Court at Bombay. In this civil revision application the defendants have challenged judgment and order dated 10/12/2003 passed by the City Civil Court on Notice of Motion No. 3591 of 2003 in the said summary suit.

2. Few facts will have to be stated to appreciate the nature of the controversy.

It appears that the respondent-plaintiff has filed 20 suits for recovery of money from the defendants on the basis of writings alleged to have been executed by the defendants between 1991 to 1996. The plaintiff's case is that he has lost the originals of the said documents. He, therefore, annexed to the plaint xerox copies of the said documents.

3. It is an admitted position that by consent of the parties, the procedure of giving examination-in-chief by filing affidavits as per Order 18 Rule 4 of the Code of Civil Procedure ("the Code" for short) was adopted. On 20/7/2002 PW 1 Nitin Rasiklal Sheth was examined. He was cross-examined by the defendant in person. On 12/8/02 Dushyant N Shah was examined. On that day the court made the following noting:-

> "As per the request of Mr. Thakkar, the documents and the affidavits are taken on record as Exhibits C, D & E Collectively, under Order 18 Rule 4 of the Code of Civil Procedure ("the Code" for short) as amended and effective from 1/7/02".

4. Admittedly Exhibits C, D & E are the disputed documents. It is the case of the defendants that the defendants for the first time came to know on 12/8/02 that the documents which were insufficiently stamped were

allowed to be stamped by the Superintendent of Stamps by imposing penalty. According to the defendants the xerox copies of the said documents were sought to be regularised by allowing the plaintiffs to pay full stamp duty and penalty. It is the case of the defendants that this is an illegality. According to the defendants they raised an objection before the learned trial Judge who was of the view that it is not for him to decide this point but the defendants will have to go to the revenue authorities. Accordingly the defendants approached the Superintendent of Stamps and asked for inspection. The Superintendent of Stamps did not give inspection of documents. The defendants, therefore, preferred a revision to the appellate authority. The appellate authority directed the Superintendent of Stamps to reconsider the issue. Since their grievance was not redressed the defendants' filed a writ petition in this court being Writ Petition No. 6661 of 2002 challenging the constitutionality of Section 3 of the Bombay Stamp Act 1958. On 13/8/03 the Division Bench disposed of the said writ petition by passing the following Order:-

> "We are not inclined to stay the proceedings in the suit. Petitioner is free to agitate the issue of admissibility of the documents stamped under the proviso to section 3 in the pending suit. In case the suit is decreed, the petitioner will be at liberty to apply for interim relief and if

such an application is made it will be considered on its own merits. Civil Application is disposed of."

5. After this order was passed the petitioners took out instant motion on 20th October, 2003 inter alia praying that the court should dismiss the suit filed by the plaintiff on the ground that xerox copies of the documents on the basis of which the plaintiffs have filed the said suits were insufficiently stamped and deficit stamp duty and penalty are paid on the copies of the original writing under Article 1 of Bombay Stamp Act and not on the original documents. It was further prayed that the court should de-exhibit and reject the xerox copies of the insufficiently stamped original suit writings produced with affidavit of Mr. Dushyant Shah on 12/8/02 and on which full stamp duty and penalty are allowed to be paid by Superintendent of Stamps under Article I of Bombay Stamp Act.

6. By the impugned order the trial court dismissed the said notice of motion holding inter alia that the propriety or otherwise of the stamping of the copies of the suit instruments in the 17 suits, is a matter in controversy in the writ petition and that the court cannot deal with the same. The court further observed that the matter is substantially part heard and plaintiff's witnesses have been substantially cross-examined. The cross-examination is made even on the disputed documents. The court further observed that

the defendants have an opportunity to lead their evidence and to challenge admissibility after the evidence is over. It is this order which is under challenge before me.

7. I have heard Mr. Thakkar, learned counsel for the appellants at considerable length. He submitted that the learned Judge could not have dismissed the motion on the basis of observations made by the Division Bench in its order dated 13/8/03. He submitted that the Division Bench had given liberty to the defendants to agitate the issue of admissibility of the documents and it is in view of these observations that the notice of motion was taken out. Therefore, the trial court ought to have given an opportunity to the defendants to agitate the issue of admissibility of the documents. The learned counsel contended that the trial court has wrongly noted that the defendants had not objected to the documents being exhibited. He further submitted that the order passed by the trial court is clearly contrary to the Supreme Court judgment in **Javer Chand & Ors. v. Pukhraj Surana, AIR 1961 SC 1655** where the Supreme Court has observed that where a question as to the admissibility of a document is raised on the ground that it has not been stamped or has not been properly stamped, the party challenging the admissibility of the document has to be altert to see that the document is not admitted in evidence by the Court. The Court has to judicially determine the matter as soon as the document

is tendered in evidence and before it is marked as an exhibit in the case.

8.The learned counsel contended that the documents have been taken on record as Exhibits C, D and E Collectively. It is apparent, therefore, that the learned Judge has not considered the admissibility of each document. In this connection he relied on **Ram Ratan v. Bajrang Lal, AIR 1978 SC 1393** and submited that this court should give a direction to the trial court that the issue regarding admissibility of each document be re-examined in a time frame laid down by this court.

9.As against this the learned counsel for the respondent submitted that no objection was raised by the defendants to the documents being admitted in evidence and, therefore, the defendants cannot now seek a direction to the trial court to get admissibility of each document re-examined. The learned counsel submitted that this is a tactic to delay the disposal of the suit. The noting made by the learned Judge on 12/8/02 clearly indicates that as per the request of the learned counsel for the defendants the documents and the affidavits are taken on record as Exhibits C, D & E collectively. The trial court order does not indicate that any objection was taken to the said documents being taken on record and marked as exhibits and, therefore, this court should foil the attempt made by the defendants to procrastinate the litigation.

10. I am inclined to agree with the learned counsel for the respondent. If

in fact any objection was taken to the documents being exhibited it was the duty of the learned counsel for the defendants to get the objection recorded by the trial court. If the objection was overruled the defendants could have at that stage challenged the said order. The record as it stands today does not indicate that any challenge was ever raised.

11. It is also pertinent to note that thereafter the trial has proceeded PW1 and PW2 have been examined and cross-examined and this has gone on upto February, 2004. I have perused the notes of evidence and I find that the witnesses have been cross-examined on the basis of the same documents. Therefore, I do not find any substance in the arguments of the learned counsel for the defendants that any objection was raised to the admissibility of the said documents.

12. It is true that in **Javer Chand's case (supra)** the Supreme Court has stated that the court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. But in the very judgment the Supreme Court has stated that the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the court. This alertness is absent in this case because the witnesses have been extensively cross-examined on the very same documents. Further observations of the Supreme Court in **Javer Chand's case (supra)** are material and need to be

quoted:

> "Once a document has been marked as an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, Section 86 comes into operation. Once a document has been admitted in evidence as aforesaid it is not open either to the trial court itself or to a Court of Appeal or Revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the same Court or a Court of superior jurisdiction."

These observations of the Supreme Court would clearly go against the defendants.

13. In **Ram Ratan"s case (supra)** the Supreme Court has reiterated the same principles but has observed that;

> "When the document is tendered in evidence by the plaintiff while in witness box and objection is raised by the defendants that the document is inadmissible in evidence as it is not duly stamped or for want of registration, it is obligatory upon the trial Judge to apply his mind to the objection raised and to decide the objection in accordance with law. Tendency sometimes is to postpone the decision

to avoid interruption in the process of recording evidence and, therefore, a very convenient device is resorted to, of marking the document in evidence subject to objection. This, however, would not mean that the objection as to admissibility on the ground that the instrument is not duly stamped is judicially decided, it is merely postponed. In such a situation at a later stage before the suit is finally disposed of it would none-the-less be obligatory upon the court to decide the objection."

14. The objection of the defendant is to the admissibility of the documents itself and not to its mode. In this connection the observations of the Supreme Court in **R V E Venkaktachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple.** The Supreme Court while considering the admissibility of the documents has observed as under:

"The objection as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular

or insufficient. In the first case, merely because a document has been marked as “an exhibit”, an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit.”

15. Therefore, where the objection is that the document itself is inadmissible merely because it is exhibited as an exhibit an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision.

16. The Division Bench of this court has also observed that the defendant would be at liberty to agitate the issue of admissibility in the pending suit. In the facts and circumstances of this case, therefore, it is not possible to direct the trial court to examine the admissibility of each document. It would be open to the defendants to agitate the issue of admissibility in the pending suit and the trial court will deal with it in accordance with law and

in the light of the above mentioned judgments of the Supreme Court. The plaintiffs will be at liberty to raise all objections. All contentions of both sides are kept open. The defendants will confine their arguments to the admissibility of the disputed documents only.

17. The Revision Application is disposed of in the aforestated terms.

18.Certified copy expedited.